

EDITORIAL

Protecting Human Rights Through a Constitutional Approach

Novum Jus, the law journal published by the Universidad Católica de Colombia, is committed to furthering the advancement of fundamental rights through the publication of provocative, yet scientifically sound articles. This issue deals with the protection of human rights at a fundamental level, ranging from theoretical approaches to law and politics, to the rights of children and people with disabilities.

Constitutionalism is understood as the idea that the powers of the government should be limited by the Rule of Law, or Constitution. This Rule of Law is directly derived from the people, and, therefore, it is the people who are empowered to change it, replace it, or abolish it. The average person experiences constitutionalism through the strength and legitimacy of the surrounding institutions, and it is only when these institutions are weakened or breached, that democracy is threatened, and the will of the people compromised. The Constitution, as the fundamental law of the land, provides the framework for a state's peaceful existence and stable international relations.

Modern notions of constitutionalism are directly derived from John Locke's conception of natural law, and his idea that there would not be a need for a political system if not for the "corruption and evil of degenerate men"¹. Latin America has recognized these notions through the figures of constitutional amendments and review. The doctrine of implicit limits to constitutional reform and the validation of constitutions of 'dubious' legal origins through the theory of constituent power have been pointed out as the most groundbreaking events in Latin American constitutionalism².

¹ John Locke, *Two Treatises on Government* (Londres: R. Butler, 1821), 160.

² Joel I. Colón-Ríos, "Constitutionalism and Democracy in Latin America", *New Zealand Association for Comparative Law Yearbook* (2015): 158.

The article “*Donde derecho y política se acoplan estructuralmente: las Constituciones*” brings together law and politics through the legal figure of the constitution, and analyzes the use of the constitution as a tool by legal and political forces in an attempt to achieve state legitimacy. Constitutions are presented as one of the results of the evolution of these forces precisely because they contribute to maintaining the functional differentiation of the social system, especially between law and politics.

Of course, every political system has a constitution, whether or not the system in itself is constitutional. Cuba, for example, achieved a constitutional order through *de facto* means, specifically with the 1976 constitution, which was adopted through irregular means amidst a socialist revolution. The article “*Enfoque familiar sobre cese de convivencia en la jurisprudencia del Tribunal Supremo Popular de Cuba*” analyzes the implications of evicting a family member under the fundamental right to dignified housing, and makes the case for a separate family jurisdiction in order to deal with these issues. Regardless of how the institutional system in Cuba diverges from modern notions of freedom and individuality, it attempts to publicly legitimize itself through the same protections awarded by liberal states.

When a political system is corrupted by forces other than democracy and good governance, the supreme goal of constitutionalism is interrupted and there is a disconnection between citizens and their institutions. The article “*Why the case of bacha bazi deserves international attention*” explores the implications of a practice that has been widely condoned by Islam and overlooked by most international organizations. This practice violates the fundamental rights of children in Afghanistan, a country with a constitution, but no constitutionalism. Conversely, the rights of children are addressed from a different perspective in the article “*Genealogía de la tortura en Colombia: una mirada desde los derechos humanos*,” which examines the issue of torture of children and adolescents in Colombia from a human rights perspective. The article points out that despite a concerted effort by the Colombian state to create a policy of protection of human rights (let us not forget that the Colombian Constitution places higher importance on the protection of the rights of children than on adults’ rights), children continue to be subject to torture under the current legal system. Moreover, the definition of torture under Colombian law is murky at best.

Novum Jus explores fundamental rights under a constitutional framework in Latin America. The article “*Personas con discapacidad mental o psicosocial en situación de calle*” aims to examine the reality of people with disabilities who experience

homelessness in Mexico, and contribute to a social understanding of these systematic violations of human rights through a legal base in order to deal with the problem in an effective manner.

Colombia, as a social and democratic state of law, is committed to upholding both fundamental rights and the principles contained in the Political Constitution, which are the basis of the guarantees afforded by constitutionalism. Based on theoretical perspectives in the history of law and society, specifically, natural law, positive law, and real law, as well as the legal trilemma (validity, effectiveness, and legitimacy) and the debates they provoke, these ideas lead to conceptions regarding fairness and formal and social orders³. Therefore, laws must always operate subject to facts and effectiveness in their performance; that is, the law must materialize the protections enshrined in the constitution. *Novum Jus*, with the help of its team of collaborators and editorial staff, has made a great effort to bring you an issue that addresses the protection of fundamental rights under different constitutional systems.

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- Tirado Acero, Misael. "Editorial". *Novum Jus* (2015): 7-8.

³ Misael Tirado Acero, "Editorial", *Novum Jus* (2015): 7.